Lee Lumber and Building Material Corp. *and* Carpenter Local No. 1027, Mill-Cabinet Industrial Division, a/w the United Brotherhood of Carpenters and Joiners of America, Chicago and Northeast Illinois District Council of Carpenters, AFL–CIO. Cases 13–CA–29377, 13–CA–29441, 13–CA–29578, and 13–CA–29619

February 27, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On March 19, 1991, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.

1. The complaint alleges that the Respondent's secretary-treasurer, Randy Baumgarten, threatened employees that the Respondent would discontinue its profit-sharing plan if a new collective-bargaining contract was negotiated with the Union, in violation of Section 8(a)(1). Baumgarten testified that he called a meeting of unit employees in March 1990 to answer questions that had been raised by some employees about the future of profit sharing. According to Baumgarten's credited version of what he said at the meeting, Baumgarten first told the employees that he could not threaten or promise anything, but that he wanted to answer any questions they might have. When asked whether the profit-sharing plan would be continued, Baumgarten reminded the employees that in the negotiations held the previous year, the Union had sought to replace the profit-sharing program with its own pension plan,[2] and indicated that the Union might do so again in negotiations for a new agreement. He also explained that, under the existing profit-sharing plan, employees were vested after 5 years, but that under a pension program the older employees probably would not be fully vested by the time they retired. The judge found that Baumgarten's remarks were not unlawful threats to take away benefits, but lawful statements of what might happen in the course of negotiations.[3]

The judge nevertheless found that Baumgarten's statements, which sparked a decertification movement among unit employees almost immediately, supported complaint allegations that employees were unlawfully encouraged to invoke the decertification procedure, and that indeed the statements constituted such unlawful activity. He found, first, no indication that the employees intended to circulate a decertification petition before Baumgarten made his remarks. The judge then rejected Baumgarten's explanation that he called the March meeting in response to the employees' concerns over continuation of the profit-sharing program; he found instead that ''this undertaking was explainable only in terms of a zealous desire to topple the Union.'' He found that Baumgarten was in no position to answer questions or to allay employees' concerns about the Union's bargaining stance, because negotiations had not begun and the Union had advanced no demands at all. Moreover, he observed, the employees would not lose the profit-sharing plan, even if the Union again attempted to replace it with the pension program, unless the Respondent agreed. He further noted that, the employees having opted to retain profit sharing instead of changing to the pension program, there was no reason for Baumgarten to assume that the Union would flout their revealed desires by insisting again on switching to the pension program. The judge concluded that Baumgarten had seized on and exploited the employees' concerns over the issue of profit sharing as a means of discrediting the Union, and that he had called the March meeting with that purpose in mind. In support of his conclusion, the judge noted that Baumgarten held the meeting only a few days before the 30-day open period for filing decertification petitions would have elapsed, and that he told the employees, on his own initiative and without solicitation, that any such petition would have to be filed soon.[4]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the judge's citations to *Leonard Wholesale Meats*, 136 NLRB 1000 (1962), and *Superior Bakery*, 294 NLRB 256 (1989), enfd. 893 F.2d 493 (2d Cir. 1990). We shall also modify his recommended Order and notice to reflect the accurate description of the bargaining unit.

[2] In the previous negotiations, the question of whether to keep the profit-sharing plan or adopt the Union's pension program, with respect to employees hired before May 19, 1989, was left to a majority vote of the employees. The employees voted to retain the profit-sharing plan.

[3] No exceptions were taken to this finding.

[4] In response to questions about how the Union could be voted out, Baumgarten also gave the employees general information concerning the filing of petitions and the location of the Board's office. The judge found that supplying that sort of information, without

The judge found that, under all the circumstances, Baumgarten's remarks ''transcended neutrality on representational issues, by implanting the seeds of discord through direct communication with employees,'' and therefore constituted unlawful encouragement of the decertification movement.[5]

The Respondent excepts. It contends that, having found that Baumgarten had not threatened employees or promised them benefits, the judge erred in finding that Baumgarten had nonetheless unlawfully encouraged their decertification activities. It also urges that the judge improperly relied on Baumgarten's motive, or intent, in finding his otherwise lawful statements to be unlawful.[6] We find merit in the Respondent's exceptions.

We first agree with the Respondent that the judge improperly relied on Baumgarten's motive in finding that Baumgarten interfered with the employees' exercise of their Section 7 rights by encouraging them to file the decertification petition. Section 8(a)(1) is violated when an employer's statements ''interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7.'' The Board and the courts have long held that the test for unlawful interference, restraint, or coercion does not turn on the employer's motive, or on actual effect. Rather, the test is whether the employer's statements may reasonably be said to have tended to interfere with employees' exercise of their Section 7 rights.[7]

We shall analyze Baumgarten's statements, therefore, without regard to whether he intended to cause the employees to become disaffected from the Union. Under that analysis, we are persuaded that Baumgarten did not impermissibly interfere with, restrain, or coerce the employees by encouraging their decertification activities.

To begin with, the evidence indicates that Baumgarten called the March meeting in response to rumors that were circulating in the shop and to questions that had been asked by employees, regarding continuation of the profit-sharing program.[8] When the meeting started, Baumgarten stated that he could not make any threats or promises; and, as the judge found, he did not. Instead, he told the employees that he wanted to answer any questions they might have. Most of the questions concerned profit sharing. As we have recounted, Baumgarten informed the employees that profit sharing was a negotiable item, that the Union in the previous negotiations had tried to replace profit sharing with the Union's pension plan, and that ''it could happen again, but it might not [happen] again. It was something that could be negotiated.'' He also called the employees' attention to what he considered a disadvantage of switching to the pension plan, at least for older employees. There is no contention that any of these statements were inaccurate. When the employees asked what steps they should take to vote the Union out, Baumgarten responded with only general information of the kind employers may lawfully provide.[9]

It is clear that, under Section 8(c), an employer may lawfully furnish accurate information, especially in response to employees' questions, if it does so without making threats or promises of benefits.[10] That is what Baumgarten did. The judge nevertheless found that Baumgarten acted unlawfully, in an attempt to discredit the Union and promote its rejection by the employees, by gratuitously suggesting that the Union might take a negotiating position with regard to the pension/profit-sharing issue that would be disfavored by many of the unit employees. We disagree. The

more, would not constitute unlawful assistance to the employees in filing the petition. (No exceptions were filed to this finding.) However, in light of his finding that Baumgarten unlawfully encouraged the employees to file the petition, the judge found that Baumgarten also unlawfully advised the employees about how to accomplish the filing.

[5] In fn. 6 of his decision, the judge found that Baumgarten, in a private conversation with employee LaRosa, said that the Union was talking about eliminating profit sharing and going with the pension plan, and that ''they got the right to do it if they want to.'' The judge did not rely on those remarks in finding that Baumgarten unlawfully encouraged the decertification movement, and no exceptions were filed to his failure to do so.

[6] The Respondent also contends that the judge erred in finding that Baumgarten acted out of a desire to get rid of the Union, and that the judge improperly precluded the Respondent from introducing evidence of Baumgarten's actual motive. Although, as discussed below, we find that the issue of motive was irrelevant to the 8(a)(1) issue, we find no merit to the Respondent's due process contention. Contrary to the Respondent's representation on p. 28 of its brief, the Respondent did, in fact, introduce evidence pertaining to Baumgarten's motive. Baumgarten was asked why he held the March meeting and why he made the statements to employees regarding the profit-sharing and pension programs, and testified fully and without objection on both subjects. The Respondent does not offer to explain what, if any, additional evidence concerning motive it was prevented from introducing. On the issue of motive, then, the Respondent was not denied due process; it simply failed to convince the judge.

[7] *El Rancho Market*, 235 NLRB 468, 471 (1978), enfd. mem. 603 F.2d 223 (9th Cir. 1979); *Munro Enterprises*, 210 NLRB 403 (1974); *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1114 (7th Cir. 1973); *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946).

[8] Although the judge found that Baumgarten's decision to address the employees could be explained only in terms of a desire to oust the Union, he did not discredit Baumgarten's testimony that several employees had asked questions about profit sharing. In addition, employee LaRosa testified that there was a rumor before the March meeting that profit sharing would be discontinued.

[9] The judge found that Baumgarten volunteered the information that the employees needed to file their decertification petition soon. Although the judge clearly disapproved of Baumgarten's providing this information unbidden, we do not share his view. Because the open period for filing election petitions was about to end, Baumgarten's remark was simply an accurate statement of the Board's procedures.

[10] See, e.g., *Eagle Comtronics*, 263 NLRB 515 (1982).

credited testimony establishes that Baumgarten did not say the Union *would* insist on switching from profit sharing to the pension plan, or even that the Union would bring the subject up in negotiations. He merely stated that the Union might raise the pension/profit sharing issue, as it had in the previous negotiations, and that the subject would be negotiable.[11] As it happened, Baumgarten's remarks caused consternation among the employees, and led to the filing of the decertification petition. Otherwise lawful statements do not become unlawful, however, merely because they have the effect (intended or otherwise) of causing employees to abandon their support for a union.[12] Accordingly, we find, contrary to the judge, that the Respondent did not violate Section 8(a)(1) by encouraging the filing of the decertification petition. Accordingly, we also find, contrary to the judge, that Baumgarten did not unlawfully provide assistance by advising the employees, in general terms, about how to file the petition.

2. Although we have found no unlawful encouragement of the employees' decertification activities, we agree with the judge, for the reasons stated in his opinion, that the Respondent violated Section 8(a)(1) by providing assistance, in the form of time off with pay, reimbursed parking expenses, and transportation,[13] to the employees who filed the petition with the Board. We also agree with the judge that the Respondent's refusal, for a period of several weeks, to meet with the Union for the purpose of negotiating a new contract violated Section 8(a)(5),[14] as did its failure to provide certain relevant information requested by the Union. Further, we adopt the judge's finding that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union in July 1990.[15]

3. The judge also found that the Respondent violated Section 8(a)(5) by unilaterally changing terms and conditions of employment of employees in the unit after it withdrew recognition from the Union. We adopt the judge's findings in this regard except for his finding that the Respondent unlawfully declined to honor checkoff arrangements with the Union. As the Respondent points out, an employer's duty to check off union dues does not survive the expiration of the collective-bargaining contract.[16] The Respondent ceased to check off and remit union dues only after its contract with the Union had expired. Its actions in this respect therefore were not unlawful.

ORDER

The National Labor Relations Board orders that the Respondent, Lee Lumber and Building Material Corp., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Assisting employees in the filing of a decertification petition by providing reimbursement for wages and parking fees that would otherwise be lost by employees who participated in the filing of the petition.

(b) Refusing to bargain in good faith with the Union concerning the rates of pay, wages, hours, and working conditions of employees in the following appropriate unit:

> All full-time, part-time, temporary, or seasonal production and maintenance foremen, leadmen, journeymen, millmen, apprentices and all other employees engaged in work covered by the ''Occupational Jurisdiction of the Union (Mill-Cabinet-Industrial Division),'' including, but not limited to, in-plant millwork production; fabrication of cabinets, tables, desks, doors, sash, window frames, millwork, store fixtures, display fixtures, plastic laminates and veneers of all types used in the manufacture thereof; component parts; installers of hardware; gluers, scrapers of glue, sprayers; handlers of materials to and from clamp; bench-

[11] If the Union had never tried to persuade the Respondent to abandon its profit-sharing plan in favor of the Union's pension program, or if Baumgarten had attempted to mislead the employees by stating that the Union actually was, again, demanding a change to the pension plan, we might reach a different result.

[12] See *Cumberland Shoe Co.*, 160 NLRB 1256, 1259 (1966). Nor are Baumgarten's lawful statements rendered unlawful because they were made (as we find below) in the context of other, unlawful actions.

Fabric Warehouse, 294 NLRB 189 (1989), enfd. mem. sub nom. *Hancock Fabrics v. NLRB*, 902 F.2d 28 (4th Cir. 1990), cited by the judge, is inapposite to this case. The employer in *Fabric Warehouse*, unlike the Respondent, independently violated Sec. 8(a)(1) by promising employees better benefits if they got rid of the union. The Board specifically relied on the promise of benefits in finding that the employer had unlawfully encouraged employees to circulate a decertification petition. 294 NLRB at 191.

[13] The Respondent does not dispute the judge's finding that the provision of transportation, though not alleged in the complaint to have been unlawful, was an issue that was litigated sufficiently to warrant the finding of a violation.

The Respondent does contend that the judge erred in finding that it unlawfully assisted the decertification effort, because the employees signed the petition before the assistance occurred. We find no merit to this exception. But for the Employer's granting time off (with pay) for involved employees, the petition might not have been filed. See *Dayton Blueprint Co.*, 193 NLRB 1100, 1108 (1971).

[14] The Respondent excepts to this finding, but argues only that (1) the Respondent did not actually foreclose negotiations during the relevant period, (2) the Union acquiesced in the delay in bargaining, and (3) the Respondent ''cured'' the violation by commencing bargaining later. We find no merit in those contentions.

We agree with the judge that the Respondent could not lawfully rely on the tainted decertification petition as the reason for declining to bargain with the Union.

[15] In agreeing with the judge that the withdrawal of recognition was tainted by the Respondent's unremedied unfair labor practices, however, we rely only on the unlawful assistance to the decertification movement in March, and on the delay in bargaining caused by the Respondent's refusal to meet with the Union.

[16] See, e.g., *Tampa Sheet Metal Co.*, 288 NLRB 322, 326 fn. 15 (1988).

work, assemblers, lay-out, operators of power machinery and hand power tools relating thereto.

(c) Refusing to bargain in good faith by curtailing contract renewal negotiations on behalf of employees in the unit solely because a decertification petition is pending.

(d) Refusing to bargain in good faith by failing, on request, to furnish information relevant and necessary to the Union's performance as exclusive representative of employees in the unit.

(e) Refusing to bargain in good faith by withdrawing recognition from the Union.

(f) Refusing to bargain in good faith by unilaterally, without notice to or negotiating with the Union, discontinuing payments to the Chicago and Northeast Illinois District Council of Carpenters Apprentice and Training Program, discontinuing union visitation rights, and granting wage increases to unit employees.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with the Union, as the representative of the employees in the unit, and embody any agreement reached in a written contract.

(b) On request, furnish the Union with a copy of its health insurance policy and a list of unit employees who participate in the profit-sharing plan.

(c) Resume payments to the Chicago and Northeast Illinois District Council of Carpenters Apprentice and Training Program, and make whole the latter by remitting delinquencies as specified in the remedy section of the judge's decision, with interest.

(d) Post at its facilities in Chicago, Illinois, copies of the attached notice marked ''Appendix.''[17] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT assist employees in repudiating Carpenter Local No. 1027, Mill-Cabinet-Industrial Division, a/w the United Brotherhood of Carpenters and Joiners of America, Chicago and Northeast Illinois District Council of Carpenters, AFL–CIO by showing our support for decertification by reimbursing wages and parking fees that would otherwise be lost by employees who filed that petition.

WE WILL NOT refuse to bargain in good faith with the Union concerning the rates of pay, wages, hours and working conditions of employees in the following appropriate unit:

All full-time, part-time, temporary, or seasonal production and maintenance foremen, leadmen, journeymen, millmen, apprentices and all other employees engaged in work covered by the ''Occupational Jurisdiction of the Union (Mill-Cabinet-Industrial Division),'' including, but not limited to, in-plant millwork production; fabrication of cabinets, tables, desks, doors, sash, window frames, millwork, store fixtures, display fixtures, plastic laminates and veneers of all types used in the manufacture thereof; component parts; installers of hardware; gluers, scrapers of glue, sprayers; handlers of materials to and from clamp; benchwork, assemblers, lay-out, operators of power machinery and hand power tools relating thereto.

WE WILL NOT refuse to bargain in good faith by suspending contract renewal negotiations solely because a decertification election petition has been filed.

WE WILL NOT refuse to bargain in good faith by refusing, on request, to furnish information relevant and necessary to the Union's performance as exclusive representative of employees in the unit.

WE WILL NOT refuse to bargain in good faith by withdrawing recognition from the Union.

WE WILL NOT refuse to bargain in good faith by unilaterally, and without notice to, or negotiations with the Union, discontinuing payments to the Chicago and Northeast Illinois District Council of Carpenters Apprentice and Training Program, and discontinuing union visitation.

WE WILL NOT refuse to bargain in good faith by unilaterally, and without notice to, or negotiations with the Union, granting wage increases to employees in the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain in good faith with the Union, as the representative of the employees in the unit, and embody any agreement reached in a written contract.

WE WILL, on request, furnish the Union with a copy of our health insurance policy and a list of unit employees who participate in the profit-sharing plan.

WE WILL resume payments to the Chicago and Northeast Illinois District Council of Carpenters Apprentice and Training Program, and make whole the latter by paying all delinquencies which have accrued, with interest.

LEE LUMBER AND BUILDING MATERIAL CORP.

Dawn Scarlett and *Jessica Willis, Esqs.*, for the General Counsel.

James S. Frank and *Paul F. Gleeson, Esqs. (Vedder, Price, Kaufman & Kammholz)*, of Chicago, Illinois, for the Respondent.

Collins P. Whitfield, Esq. (Hugh J. McCarthy & Associates), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Chicago, Illinois, on December 12 and 13, 1990, upon an original unfair labor practice charge filed on March 29, 1990, and a complaint issued in Cases 13–CA–29377 and 13–CA–29441 on July 30, 1990, and a separate complaint issued in Cases 13–CA–29578 and 13–CA–29619 on September 27, 1990, alleging that the Respondent independently violated Section 8(a)(1) of the Act by threatened discontinuation of its profit-sharing plan,[1] by unlawfully assisting employee defections from the Union in a variety of respects, including payment of wages for time spent in filing a decertification election petition, reimbursement of expenses, and a supervisor's signing a petition rejecting union representation. The complaint further alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing, upon request, to furnish certain relevant information, by refusing to meet with the Union during a specified time frame, and by ultimately withdrawing recognition from the Union. Finally, in light of this latter allegation, the Respondent is charged with derivative 8(a)(5) violations based upon subsequent changes in employment terms. In its duly filed answers, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel, the Charging Party, and the Respondent.

On the entire record,[2] including my opportunity directly to observe the witnesses while testifying and their demeanor, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, from two facilities in Chicago, Illinois, is engaged in the retail sale of lumber and building materials. In the course of that operation, the Respondent during the calendar year prior to issuance of the complaints, derived revenues exceeding $500,000, while receiving at said facility, goods, and materials valued in excess of $50,000 directly from points outside the State of Illinois. The complaints allege, the Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaints allege, the answers admit, and I find that Carpenter Local No. 1027, Mill-Cabinet Industrial Division, a/w the United Brotherhood of Carpenters and Joiners of America, Chicago and Northeast Illinois District Council of Carpenters, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

This proceeding is primarily concerned with legitimacy of an employer's termination of a bargaining relationship. Twice during 1990, certain unit employees engaged in efforts to repudiate the Union. Proponents of the complaints argue that both incidents were inspired by the Respondent's unfair labor practices, and hence furnished no justification for the Respondent's ultimate withdrawal of recognition. The Respondent denies any undue participation in, or support of decertification activity, or that it engaged in any illicit behavior which might have inspired employees to reject the Union. It characterizes this proceeding as ''a desperate attempt . . . by the Union to frustrate the uncoerced desires of the unit employees to exercise their Section 7 rights to be rid of the Union, by blocking their efforts to obtain a decertification election and by attacking their subsequent express repudiation of the Union through baseless charges.''

[1] Allegations that the Respondent violated Sec. 8(a)(1) by interrogating employees concerning union sympathy and, through Supervisor Victor Barba, soliciting employees to sign a decertification petition were unsubstantiated and therefore dismissed at the hearing.

[2] Certain errors in the transcript have been noted and corrected.

B. *Overview*

The Respondent is a family held concern. It is owned and operated by Ricky Baumgarten, its president, and Randy Baumgarten, its secretary-treasurer, both sons of Lee Baumgarten, the founder. There are two locations in Chicago. The southside facility includes a mill shop. There, as an adjunct to material sales, the Respondent manufactures building components, such as window units, prehung doors, molding, and surface hardwoods. In October 1988, the Union was certified by the Board as exclusive bargaining agent of the previously unrepresented mill shop employees following a Board-conducted election.[3] The bargaining unit was small, at times material, numbering no more than 14 employees. Ensuing negotiations yielded a collective-bargaining agreement, effective May 26, 1989, through May 25, 1990.

In July 1990,[4] less than 2 years after certification, the bargaining relationship was terminated in the context of evidence indicating that employees had rejected union representation. This disenchantment with the Union first surfaced in March 1990. In consequence, a decertification election petition was filed on March 20, 5 days prior to the insulated 60-day period in which no election petition will be processed under the Board's contract-bar rules. See, e.g., *Leonard Wholesale Meats*, 264 NLRB 1000, 1001 (1962).

Earlier, the opening of contract renewal negotiations had been scheduled for April 11. Although furnished no evidence that the Union no longer represented a majority, the Respondent refused to meet on that date, informing the Union that it would be inappropriate to do so in light of the impending decertification election. This position was later reversed on May 5, when the Respondent notified the Union that the law compelled bargaining and it would comply. Negotiations opened on May 23, with the Union presenting its first proposal at that time.

As bargaining continued, on July 2, a document repudiating the Union was circulated for signature of unit employees. It was signed by a majority. By then, the first contract had expired, and ongoing negotiations had failed to produce a new one. Effective July 3, after a majority had signed, the signatures were presented to the Respondent, and based thereon, recognition was withdrawn.

C. *Concluding Findings*

1. Emergence of decertification activity: Randy Baumgarten addresses unit employees

a. *Preliminary statement*

By letter of February 1, the Union served notice of its intention to renegotiate the subsisting agreement. (G.C. Exh. 3.) In March, prior to the onset of collective-bargaining negotiations, Randy Baumgarten initiated and conducted a meeting with unit employees in the mill shop. Shortly thereafter, employees circulated and signed a statement expressing their desire for an election, and then filed a decertification petition with the National Labor Relations Board.

The General Counsel and the Charging Party argue that the seeds of disenchantment with the Union were implanted at that time through unlawful 8(a)(1) conduct in the form of Randy Baumgarten's threat to discontinue the long-established profit-sharing plan if a new contract were negotiated, and his encouragement of decertification activity. The Respondent denies that the decertification activity was preceded by any unlawful conduct on the part of Randy Baumgarten or any other management representative.

b. *The alleged threat*

The complaint alleges that Randy Baumgarten expressed a threat proscribed under Section 8(a)(1) by telling employees at the March meeting ''that Respondent would discontinue its profit-sharing plan if a new contract were negotiated.''

Prior to organization by the Union, the mill workers participated in the Company's profit-sharing plan. The Union is affiliated with the Chicago and Northeast Illinois District Council of Carpenters, which maintains its own pension plan. During 1988–1989 negotiations, these plans were negotiated as alternatives, with the Union demanding the District Council's plan, and the Respondent seeking to preserve profit sharing. Ultimately, the matter was left to employee choice according to formula set forth in article IX, section 2, as follows:

> Those employees of Lee Lumber and Materials Company prior to May 19, 1989 will be allowed at their option to remain in the Lee lumber Profit sharing Plan or at their option choose to be a participant in the Chicago and Northeast Illinois District Council of Carpenters Mill Pension Plan at the terms as stated in this agreement. All employees hired after ratification of this agreement shall be participants in the Chicago and Northeast Illinois District Council of Carpenters Mill Pension Plan. It is understood by all parties that Employees cannot be participants in both plans simultaneously.

Compromise is evident on the face of this provision. Rick Baumgarten testified that the cross demands for union pension and company profit sharing ''was a long hard negotiated item, and it was left to a vote of the men in the bargaining unit for the majority to rule on choosing whether the pension of the union or the profit sharing of the company was to be followed.'' The majority opted for profit sharing. Clear evidence indicates that the older workers understood, and were specifically informed by Randy Baumgarten, that they would be prejudiced under a pension plan and therefore strongly preferred continued participation in the established profit-sharing plan.

The future of profit sharing was the sole issue that prompted Randy Baumgarten's meeting.[5] He sought to justify the

[3] The Employer did not formally oppose the Union during that campaign. The instant unit was one of several, with the Employer assertedly having long, harmonious relationships with affiliates of the Teamsters in a unit of drivers and the Laborers International in a unit lumber yard workers.

[4] Unless otherwise indicated, all dates refer to 1990.

[5] Of more than passing interest is undisputed evidence that this meeting took place shortly after certain employees were polled concerning their interest in an election to oust the Union. The response apparently was negative. Thus, employees John Serritos and Joseph LaRosa testified that shortly before Randy Baumgarten's meeting, Jose Barba, a coworker, who identified himself as an assistant super-

Continued

meeting as an attempt to ''answer'' questions that had been raised by a number of employees ''about what was going on and about profit sharing.''[6] The potential collision between pension and profit sharing was the only topic of general interest discussed on that occasion.[7]

Baumgarten avers that he prefaced the meeting with the disavowal: ''I can't threaten and I can't promise anything . . . but I want to answer any questions you might have.'' When the men asked whether they would continue to enjoy profit sharing, he claims to have responded as follows:

> [P]rofit sharing was a negotiable thing . . . [A]s far as I knew, it was up for negotiation and that it could go either way. [T]he union in the past, in the first contract had negotiated and wanted a pension program. . . . [W]e had fought to have the profit sharing program remain. [I]t could happen again, but it might not again. It was something that could be negotiated.

As for the likelihood that it might ''happen again,'' Baumgarten added:

> [T]o the best of my knowledge, most unions do have a pension plan and not a company profit sharing plan. . . . [W]hen the first contract was negotiated, the union did at first want to go with their pension program and that led me to believe that there was a possibility they might want it in the next contract.

He admits to arguing the virtues of profit sharing by making the following points:

> [S]ome of the older guys, we had a number of guys about 60 years old, if they went into a pension program they probably wouldn't be fully vested by the time they retired, and that in our profit sharing program they are vested after five years. And that the pension program distributes money in monthly allotment and the profit sharing plan, they get a check all at once when they retire.

Several witnesses testified that, because of his remarks, and in consequence of fears he engendered, they understood and developed concern that the Union would seek to revise the contract in a manner prejudicing their continued participation in profit sharing.

However pernicious, statements that employees will be disadvantaged by collective bargaining or a union's negotiating stance do not amount to a proscribed threat. See, e.g., *Histacount Corp*., 278 NLRB 681, 689 (1986); *Fountainview Place*, 281 NLRB 26, 31 (1986). The Respondent contends that this is just such a case. Apparently the General Counsel relies upon precedent in which employers' were deemed to have violated 8(a)(1) by implying that employees would lose profit sharing upon designation of a union. *Monfort of Colorado, Inc*., 298 NLRB 73 (1990); see also *Niagara Wires*, 240 NLRB 1326 (1979). No case is cited to support a violation where the Employer makes it clear that this is a probable consequence of give-and-take negotiation.[8]

The General Counsel's evidence does not substantiate that Baumgarten, directly or by fair implication, stated that profit sharing would be lost automatically by any form of continued union support. The strongest evidence to this effect appeared in a prehearing affidavit. Thus, Juan Santana, a witness who confessedly lacked independent recollection of the incident, but who initially testified that he *understood* that the Union would ask that employees be placed under a pension plan ''and that people represented by the union would no longer collect profit sharing,'' furnished a prehearing affidavit, which described the following exchange:

> I asked [Randy Baumgarten] about profit sharing. I asked him if we were members of the union or do we receive profit sharing. He responded that we would not receive profit sharing if we were in the union.

The weight given this averment is nullified by my disbelief. Because of a confessed lack of independent recollection, he was unable to vouch for the accuracy of the affidavit or confirm or adopt its content. Moreover, the affidavit strikes as improbable, without confirmation from other credible sources. Beyond Santana, the witnesses called by the General Counsel failed to provide a cohesive picture of just what Randy Baumgarten said on that occasion. Testimony elicited

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visor, personally solicited their participation in that vote. Juan Luis Santana, a coworker who also participated, and Santana testified that latter Barba advised that the Union had survived. There is no direct evidence that management was aware of the vote or its results.

[6] Employee Joseph LaRosa, on cross-examination, testified that prior to this meeting a rumor was circulating among the millwright employees that the Union would ''take away the profit sharing and go with the pension plan.'' However, uncontradicted testimony shows that the meeting in question was not the only occasion on which Randy Baumgarten broached this subject. Thus, LaRosa also testified that in a private conversation prior to his signing the decertification petition, Randy Baumgarten told him, ''the contract was going to be up . . . pretty soon and the Union was talking about eliminating profit sharing and going with the pension plan.'' LaRosa replied that the pension plan would not be good for him, whereupon Baumgarten allegedly replied, ''they got the right to do it if they wanted to.''

[7] Apart from this issue, the only topic raised was an individual complaint by employee Jose Barba who expressed concern that certain medical bills had been rejected for payment under the health plan.

[8] In a recent case, the Board declined to find a violation even where management, on its own, had declared that represented employees would not be eligible to participate in a newly established retirement-type program. Thus, in *KEZI Inc*., 300 NLRB 594 (1990), the Board broadened the imprimatur of legitimate action where management curtails benefits in the context of collective bargaining. In that case, before renewal negotiations had concluded, an employer announced that a proposed 401(K) plan would be provided for unrepresented employees, while declaring ineligible ''employees who are members of a collective bargaining unit with whom retirement benefits were the subject of good faith bargaining.'' This announcement was deemed valid even though it penalized unit employees solely because their representative had completed, or [more accurately] was participating in good faith, yet unsuccessful attempts to secure some form of retirement protection. The employer's declaration was followed by immediate decertification activity and a withdrawal of recognition. Nonetheless, the administrative law judge's findings that both were illegal was reversed, with the dispositive 8(a)(1) allegation thrown out on the theory that the announced exclusion of represented employees ''anticipates that retirement benefits will be determined through the normal process of collective bargaining . . . .'' If nothing else, this case suggests a heavy burden is imposed upon the General Counsel where attempting to invalidate the type of statement in issue here.

from employee witnesses in this regard failed to inspire confidence that they recalled the precise words used by Baumgarten. I am convinced that their accounts were based upon understanding and interpretation of his remarks, inculcated more from background than anything said by Baumgarten.[9] All employees certainly were alert to the fact that during the initial negotiations, pension and profit sharing were negotiated as alternative programs. Thus, one can assume that employees themselves contemplated that they would be bartered in the same fashion in the future. This is evident from employee LaRosa's testimony that prior to this meeting, there were rumors all over the shop that ''the Union was going to take away the profit sharing and go with the pension plan.''[10] Therefore, when the employees heard that the Union might negotiate pension, they would think, without having to be told, that their profit sharing was in jeopardy.

For the most part, the General Counsel's witnesses offer the crucial threads of corroboration to Randy Baumgarten's account of what was said. Thus, while testimony of John Serritos, Bill Napier, Juan Luis Santana, and Joseph LaRosa varied, all agree that Baumgarten indicated that it was possible that the Union would take the initiative by seeking to negotiate its pension plan. Upon consideration of all the testimony in this respect, it is concluded that no reliable, convincing basis exists for concluding that employees were told that the Company would alter its position or take any steps compromising their continued participation in profit sharing,[11] and hence there was no implication that if the Union successfully sought pension, profit sharing would be eliminated automatically. Contrary to the complaint, the credited testimony fails to substantiate that the employees were threatened in this respect, and the 8(a)(1) allegation shall be dismissed.

[9] Counsel for the Charging Party, in his posthearing brief urges error in the undersigned's having sustained objections to the General Counsel's inquiries concerning the effects of the employer's profit-sharing remarks. These rulings are reaffirmed. Where Sec. 8(c) guarantees are involved, the test of illegality is the actual words used, rather than the manner in which employees are influenced, or their subjective understanding of what was said. Legitimate argumentation devoid of threat or promise of benefit might well inspire fear, but, does not, for that reason exceed free speech guarantees.

[10] It will be recalled that even Santana testified that he ''understood'' that if the pension plan were installed unit employees ''would no longer collect profit sharing.''

[11] The General Counsel's reliance upon *Monfort of Colorado, Inc*., supra, is misplaced. There, continues enjoyment of profit sharing was conditioned upon rejection of the union. It implied action that management would take, rather than an expression of union preference, and was not made with reference to collective bargaining or against a negotiating history in which the union had taken a stance on such benefit programs. Also distinguishable is the finding of Judge Harold Kennedy in *Capitol Foods*, 241 NLRB 855, 859–861 (1979), relied upon herein by the Charging Party. First, no exceptions were taken to the administrative law judge's unfair labor practice findings. Second, as made clear by the judge, the loss of profit sharing in that case was not presented to employees as a consequence of collective bargaining, but as a consequence of unionization. See cases cited at 241 NLRB 861.

c. *Randy Baumgarten, assistance to decertification activity*

The Baumgarten meeting was also relevant to allegations that employees were unlawfully induced and encouraged to invoke the decertification procedure. It is true that neither Randy Baumgarten, nor any other agent of management participated directly in the preparation or circulation of the underlying decertification petition.[12] And standing alone, the guidance provided by Randy Baumgarten, to the extent that his aid was solicited by employees, would fail to substantiate proscribed assistance. *Tartan Marine Co*., 247 NLRB 646, 655–656 (1980). Viewed in isolation, in each instance, information supplied was in general terms. For example, Napier relates that upon inquiry as to how the Union could be eliminated, Baumgarten replied:

> You guys ought to know that. You get rid of the union the same way you got it in. Just sign a petition and take it down to the Labor Board.[13]

[12] At the hearing the General Counsel attempted to amend the complaint to allege that Jose Barba was a supervisor and that the Respondent violated Sec. 8(a)(1) of the Act by his participation in the certification process. The request was denied. In its posthearing brief the General Counsel does not ask that I reverse that ruling, only that I make a substantive finding in its favor. While conceding that this ruling foreclosed further litigation of Barba's status, including any defense, it is now urged that I apply the apparent authority doctrine upheld in *Proler International Corp*., 242 NLRB 676 (1979), enfd. 635 F.2d 351 (5th Cir. 1981), and find unlawful involvement based upon his conduct. Thus, counsel now urges that I be lured to compound the incursion upon fairness and due process that my exclusionary ruling sought to avoid. This latter ruling was made with full knowledge of the latitude given the General Counsel to raise new matters during the course of the hearing, as well as the empirical policy that the public interests safeguarded by the Act not be imperiled by governmental neglect. I remain convinced that any correction of the failure to include the Barba allegations would push these desirable considerations too far. For, I am convinced and find that the General Counsel's omission created a strong appearance that the issue was deliberated and deliberately omitted from the complaint. Based upon colloquy with counsel, and other matters of record, there is no question in my mind that the facts underlying the Barba allegations were developed during an extensive prehearing investigation, which included multiple affidavits from virtually every witness offered by the General Counsel. Barba's involvement was known to all. Prima facie evidence indicated that his job title was communicated through a posting. Yet he was not implicated in either of these longstanding complaints, despite the fact that his conduct offers the only suggestion of direct managerial involvement in the decertification activity and, hence, furnishes the most direct route to nullification of the Respondent's reliance upon that process. The failure to incorporate the Barba allegations cannot be lightly dismissed as innocent error.

[13] Except on timing, Randy Baumgarten's testimony conforms with that of Napier. He relates that the day after his mill shop meeting, Napier asked him. ''What can we do to get rid of the Union.'' Baumgarten replied, ''to the best of my knowledge, you have to write a letter to the National Labor Relations Board and get 50 percent of the guys to sign it, and then I assume there would be an election.'' Napier asked for the location of the Board, and was referred by Baumgarten to the telephone book. Later, on another day he received the same inquiry from Jorge Alvarado, and gave the same information.

Napier added that Baumgarten, at his request, offered that they could draft the petition as they wished as long as it was signed by a majority.[14]

This limited involvement, however, cannot be separated from other aspects of Randy Baumgarten's entire course of conduct, which contributed directly to renunciation of the Union. As shall be seen, if Randy Baumgarten did not pilot this effort, he had much to do with its launch. Under the precedent, direct appeals or personal involvement is not essential to a finding that decertification activity was unlawfully encouraged. It suffices that the total circumstances demonstrate that an employer, while obligated to recognize and deal exclusively with a union, transcended neutrality on representational issues, by implanting the seeds of discord through direct communication with employees. *Hancock Fabrics*, 294 NLRB 189 (1989).

That is precisely descriptive of Baumgarten's conduct. Here, as in *Hancock*, supra, there is nothing to suggest that the employees ''had any intention of circulating a decertification petition before the Respondent encouraged them to do so by its comments at . . . [the meeting].''[15] 294 NLRB at 191 fn. 10. Indeed, in this case, Baumgarten's meeting, in terms of timing, background, content, and effect was explainable solely in terms of a calculated effort to foster uneasiness with union representation and the need to act immediately to secure an election.

Baumgarten claims that he elected to address the employees because some had expressed concern over continued participation in profit sharing. As shall be seen, this undertaking was explainable only in terms of a zealous desire to topple the Union. At the meeting, Baumgarten first raised the possibility that, due to the Union, profit sharing could be in jeopardy, next offered reasons as to why this could occur, and then illustrated that this would be prejudicial to veteran employees. He concluded by informing as to how decertification could be accomplished, finally volunteering that steps had to be taken soon.

Obviously, at the time of the meeting, Baumgarten was in no position to answer questions or allay concerns about the Union's bargaining stance.[16] On the available facts, profit sharing was as much in the hands of the Employer as it was threatened by the Union.[17] No demands as to pensions, profit sharing, or any other area of collective bargaining had been presented by the Union. While there was nothing to suggest that the Union would revisit any aspect of the existing retirement formula, there was plenty room for doubt that it would. At the conclusion of the prior negotiations, it receded from its demands for the District Council's pension plan, agreeing that the employees might decide for themselves. Represented employees responded by rejecting the pension plan, opting for profit sharing. Their message was clear. Thus, the Union having yielded previously to self-determination, Baumgarten had every reason to assume that the Union would not frustrate that process by an attempt to reverse the expressed desire of unit employees. In sum, his baseless assumptions as to what the Union might do, together with observations as to how this endangered profit sharing, all to the prejudice of ''a number of guys that are about 60 years old,'' constituted officious behavior which could not be lightly dismissed as educationally oriented.

Indeed, it is difficult to imagine any rational explanation for addressing employees concerning another party's bargaining objectives before any negotiating meeting had been held or scheduled or proposals made. The only logical explanation is that Baumgarten, acting under the guise of educating the employees, was seizing upon an opportunity to discredit the Union. Why else would he seek to confront employees, hurriedly, before profit sharing had been made an issue? What was his rush to conduct a meeting, the focus of which was pure speculation? Why not wait till the Union showed its hand?

The explanation lies in the importance of timing to the Respondent's overall design. Baumgarten had informed employees that the Union could be ousted in the same fashion that it was installed. In doing so, however, he knew that this option was subject to one major qualification. Under established Board policy, election petitions filed during the term of a subsisting collective-bargaining agreement, will be entertained only during a single, 30-day period. Baumgarten held his meeting during this timeframe.[18] Credible evidence reveals that he communicated this fact to the employees voluntarily and without solicitation.[19] In this light, this premature meeting before the facts had unfolded is in consonance with an overall strategy to generate a question concerning representation. As is evident from its subsequent behavior, the Respondent labored under assumption that the election proc-

[14] Apparently the language on the petition originated with Jose Barba. With confirmation from Serritos, he testified that, on or about March 19, he dictated the message to the latter in Spanish, and Serritos ''wrote'' it down in English. Although Napier relates that it was his understanding that Jorge Alvarado drafted the petition, the latter claimed credit for minor interlineations, but did not identify the basic language as his own or as having been written by him.

[15] From all indications, just prior to Baumgarten's intervention, an effort by certain employees to repudiate the Union had failed.

[16] Baumgarten, by his own admission, had no expertise in the area of pensions, thus, questioning his own competence to lead a balanced discussion concerning the relative value of these alternatives to retirement.

[17] The assembly of employees and demeaning references to steps the Union might take were uttered with certain awareness that their could be no genuine threat to profit sharing unless the Respondent were of a mind to agree.

[18] The Board's contract-bar rules permit the processing of election petitions only within the open period between 90 and 60 days before expiration of the agreement.

[19] Several employees testified that this was the case. Thus, Serritos testified that during the March meeting, Randy Baumgarten told the employees that if they wished to vote the Union out, they had less than 30 days within which to file a petition. Bill Napier stated as follows:

> Randy spoke and said if you are going to do anything it is going to have to be done very shortly, because the contract was coming up.

Baumgarten admitted that he was aware that there was a time limit when employees could file, but denied knowledge as to what it was. However, he does not deny that the issue was discussed, instead, insisting that it was raised by employees. Thus, on cross-examination, he related: ''They asked me when do we have to, you know, is there a time we have to do it? And I said I think pretty soon.'' Basically, Baumgarten was not regarded as entirely forthright, and critical aspects of his testimony were unconvincing. At the same time, weighed against the total circumstances, it is considered more likely that Baumgarten, rather than the employees, would have broached this subject in the first instance. I believed Serritos and Napier, both of whom were incumbent employees.

ess would forestall, if not foreclose, any further negotiations.[20]

Understandably, and as intended, the meeting quickly gave way to decertification activity. Following the meeting, Napier echoed the argument spelled out by Baumgarten, rising to observe: ''that [pension plan] ain't going to help us older folks, . . . we can't work long enough to be in a pension plan long enough to benefit from it . . . . we want to keep the profit sharing.'' Napier advised his coworkers: ''let's just vote the Union out if we want the profit sharing.'' A day or two later, Jose Barba, was actively engaged in soliciting employee signatures to a document bearing the following message:

> The Employees of Lee Lumber:
>
> (millshop) we are in the disposition to have another election for the purpose of displacing the Union [G.C. Exh. 16].

Apparently 12 coworkers signed. On March 20, the document was taken to the Board's Regional Office where used to support the filing a decertification election petition.

Upon the foregoing, it is concluded that the March meeting was held as a means of producing that very result. Rather than allow the bargaining process to work, Randy Baumgarten jumped in to frustrate that process by exploiting a phantom issue, inflaming concern held by older workers that profit sharing might be lost through negotiation, and in this fashion driving a wedge between the Union and represented employees[21] during the ''window'' period in which the Board would entertain an employee-sponsored election petition. Decertification activity was sown by an issue of Respondent's own creation, rather that anything said or done by the Union, and, since a foreseeable consequence of Randy Baumgarten's conduct, it is fair to infer that this was the result he intended to produce.[22]

Upon the foregoing, the Respondent, having unlawfully fostered employee disenchantment with the Union, while instilling the idea of decertification, could not lawfully claim the right to educate them as to how this could be accomplished. Thus, its advising employees as to how, when and where they might reject the Union was interwoven in the unlawful scheme and, itself, was part and parcel of a pattern of conduct violative of Section 8(a)(1) of the Act.

2. Other assistance

a. *Compensation for filing petition*

Randy Baumgarten testified that on March 20, in midafternoon, Jorge Alvarado and Jose Barba attempted to present him with the signed petition. The former states that he threw up his hands, emphatically refusing to see the document. When the men indicated that they would take the document to the National Labor Relations Board, he touched base with Ricky Baumgarten, then told them to go ahead.

That afternoon the petition was filed with the Board's Regional office by Alvarado, in company of Joe LaRosa. To perfect the filing, several hours were required, all during working time. Neither suffered any loss of pay for time spent in this process.[23]

Jose Barba did not accompany Alvarado and LaRosa. According to Barba, for unknown reasons, he was summoned to join them at the Labor Board that afternoon. He reported this to Randy Baumgarten and obtained his permission to leave for that purpose. Contrary to his usual practice, Barba did not punch out until his return around 5 or 5:30 p.m. Barba, whose normal shift was from 5:30 a.m. to 4:30 p.m., as in the case of Alvarado and LaRosa, was paid for the entire day, with overtime.

Rick Baumgarten testified that he approved payment for those who delivered the petition to the Board because, in his words, ''I didn't know any better. If I had any idea that it would get me here and in this kind of trouble, I certainly wouldn't have.'' On cross-examination, his testimony shifted, with Baumgarten admitting knowledge that the men had been paid, but denying that it was on his authority. Indeed he went so far as to state: ''I really had nothing to do with it.''[24]

The Respondent defends on the basis of *Washington Street Foundry*, 268 NLRB 338 (1983), where the day off granted in order to file the petition would have been permitted if requested for any other personal reason. This case is distinguishable. Obviously, neither this Respondent, nor any sensible employer provides compensation, willy nilly, to those employees who choose to leave in midshift for personal reasons. Rick Baumgarten concedes that management, as a general rule, required employees, who seek to leave work for personal reasons, first, to obtain permission and then to clock out with no compensation between that point and their clocking back in. There were exceptions. Thus, Napier described an incident where he was given time off, with pay, by Victor Barba to leave work for an hour to remove his disabled car from a bus stop, a step necessary to avoid the ex-

[20] As indicated, the Respondent declined to meet with the Union on April 11, taking this action on a mistaken assumption that it did not have to negotiate while the election petition was pending.

[21] Traditionally, under this Act, it is the role of the statutory representative to develop bargaining strategies which fairly reflect the will of represented employees and to gain their assent after itself communicating proposed bargaining objectives. Management's deliberate intervention into this process in order to nurture employee fears, even if unsuccessful, foreseeably, is calculated to undermine employee confidence in their designated representative, and, thereby, reflects rejection of the principles of collective bargaining. Baumgarten's behavior in this respect violated the spirit of the basic teaching in *Medo Photo Corp. v. NLRB*, 321 U.S. 678, 684 (1944), wherein it was stated that: ''it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or minority, with respect to wages, hours and working conditions.''

[22] Normally, issues of proscribed assistance are addressed without reference to motivation. However, the goals attendant in a particular pattern of behavior may be useful in reckoning the line between an employer's lawful right to address employee concerns and the breach of neutrality evident where decertification activity is fostered under the guise of ''education.''

[23] Alvarado, testified, with corroboration from Joe LaRosa, that he delivered the petition to the Board, in LaRosa's company. He admits that he was away from the plant for ''a long time.''

[24] It is fair to assume that, whether or not authorized, the requirement that employees punch out would normally be administered at lower echelons of management, and, as he testified, rarely would be worthy of Rick Baumgarten's attention. His admission of knowledge suggests that he was alerted to what transpired, and, as he related on direct examination, gave his approval.

pense that would be associated with enforced towing. Alvarado, who signed the RD petition, testified that whether he was paid while away from work depends on duration. Thus, after receiving permission, he will not punch out if away from work merely for 30 minutes to an hour. As for leaving early, Alvarado affirmed the following description of his experience as set forth in his prehearing affidavit:

> I have not ever had a situation where I had to leave early and I did not punch out. The only time when I would leave and not punch out was when I was on some company work.

On the other hand, the Respondent points to evidence that during visitations, employees were allowed to meet with union representatives during paid time. Thus, Alvarado testified that, following the March election petition, union representatives came to the plant and were permitted to address the employees during their break. They suffered no loss in pay even though the meeting continued beyond the break.[25] In addition, Rick Baumgarten testified that employees were compensated when interviewed by Board agents on company time, but no specifics were offered as to the individuals involved, the length of the interviews, or when they took place.

On balance, the instances in which employees were allowed to leave in midshift without loss of pay were too isolated to neutralize the message of approbation suggested by management's grant of these wage concessions. It was a benefit unsupported by sufficient universality to avoid collision with Section 7 guarantees. In context of the unlawful assistance by Randy Baumgarten, the compensation bestowed upon Alvarado, LaRosa, and Barba was a further signal tending to convince those involved in this, and any future effort to repudiate the Union, that the Respondent openly endorsed their venture. The Board has held that an employer renders unlawful assistance in conjunction with decertification activity where employees are paid for time spent in filing the election petition and where transportation is provided. *Dayton Blueprint Co.*, 193 NLRB 1100, 1107–1108 (1971). Here, the Respondent was guilty of both,[26] and, as shall be seen, also reimbursed an employee for parking expense. Having provided the inspiration for decertification, and guidance as to how an election might be secured, these additional reminders were interwoven with the overall scheme of unlawful assistance. In context of the entire record, they also violated Section 8(a)(1) of the Act.

b. *Reimbursed parking*

Upon return to the plant, Alvarado, who drove his personal vehicle to the Board, was reimbursed for parking fees. The only factual question presented in this regard is whether the payment was made by Randy Baumgarten. Alvarado testified that after returning to work, he asked the latter to reimburse him for parking. Initially, Alvarado testified that ''Randy Baumgarten loaned me money for the parking lot, for the money I paid for the parking lot'' but then exonerated the latter, testifying that Mike Marco, the head salesman, gave him the money. In his prehearing affidavit, dated May 7, Alvarado averred: ''I went back to the company and Randy gave me $7 in cash for the cost of parking.''[27]

Randy Baumgarten appeared to stumble through this same incident. This is evident in the following colloquy with Respondent's counsel:

> Q. Did any of those individuals ask you at that time or anytime for reimbursement of parking fees?
>
> A. Yes. I believe they asked me and they mentioned what about parking. Mike Marco who works at the sales counter reached into his pocket and took out the money and gave them the parking money.
>
> Q. In your presence?
>
> A. I was at my station, though I don't actually recall actually seeing him do this, but I heard that he did.
>
> Q. I didn't actually observe him take the money.

Thus, according to Randy Baumgarten, after he was asked for the parking fees, the employees, before obtaining his response, apparently disappeared from sight, getting the money from Marco. Alvarado's attempt to repudiate his affidavit is rejected. Moreover, based thereon, it is concluded that Randy Baumgarten, not Marco, paid for the parking. Baumgarten's version made little sense. The truth lies in Alvarado's affidavit, and in deeming the assertion therein to constitute probative, substantive proof, I fully subscribe to the analysis, precedent and conclusions set forth by Judge Bernard Ries in *Salem Leasing Corp.*, 271 NLRB 86, 88–90 (1984).

Although this sector of the case is more significant for the suspicion it casts upon the Respondent's evidentiary case, I nonetheless find that the reimbursement of this expense, in the context of other pecuniary gestures of approbation, also constituted unlawful assistance violative of Section 8(a)(1) of the Act.

3. The 8(a)(5) allegations

a. *The initial curtailment of negotiations*

The Respondent allegedly violated Section 8(a)(5) of the Act by refusing to meet between April 11 and May 23 to

[25] By virtue of art. XII of the collective-bargaining agreement, which remained in effect at times material, union officials are authorized to visit the shop ''during working hours to interview Employees.'' LaRosa testified that the meeting in question lasted only about 10 minutes. He could not recall, however, whether it took place on working time. He was paid.

[26] On March 20, after being summoned to join Alvarado and LaRosa at the Board, according to Barba, after telling Randy Baumgarten that he did not know how to get to the Labor Board, the following transpired:

> He [Randy Baumgarten] said if you want to, we can get someone to drive you in. . . . So he told Albert and he [Albert] brought me in.

Albert, who was not a bargaining unit employee, and whose last name was unknown to Barba, then drove him to the Board. Randy Baumgarten denied having any such conversation with Barba. I do not believe that Barba, an antiunion employee, would have concocted the incident. The matter was not alleged in the complaint as within the conduct specified as unlawful. However, it was sufficiently litigated to warrant a finding under the familiar Board policy that unalleged unfair labor practices will be subject to remedy if fully litigated. See, e.g., *Pergament United Sales v. NLRB*, 920 F.2d 130 (2d Cir. 1990).

[27] Alvarado suggests that his affidavit was mistaken because he was nervous at the time. While anything is possible, it is difficult to imagine that this employee, who both in March and July was at the vanguard of decertification activity, would have erroneously implicated his boss in conduct which did not actually occur.

negotiate a new contract. The material facts surrounding this claim are virtually free from dispute. Moreover, the suspension of renewal negotiations was unaccompanied by objective evidence that the Union no longer represented a majority.

As indicated, the first contract in this bargaining unit was scheduled to expire on May 25. In anticipation thereof, the Union on February 1, wrote the Respondent requesting a negotiation date. (G.C. Exh. 3.) There was no written response. Subsequently, the parties agreed to meet on Wednesdays at alternating sites, without specifying a date for actual start of negotiations.[28] As for a date, according to Kasmer's undenied testimony, the Employer was to inform the Union as to its availability. They did not do so, prompting the Union, by letter of March 26, to suggest a meeting date of April 11, while stating that the union representatives would appear at the Employer's Northside facility at that time unless informed otherwise. Here again, there was no evidence of a reply.

In the meantime, on March 20, the decertification petition was filed in Case 13–RD–1878. (R. Exh. 5.) On March 29, the Union filed unfair labor practice charges alleging, inter alia, that the Employer violated the Act by ''sponsoring or assisting in the filing of the decertification petition.''

On April 11, the union negotiating team appeared at the Respondent's premises. They were informed that the Respondent declined to meet with them, with the Respondent's president, Rick Baumgarten, hand-delivering the following, previously mailed, statement:

> Due to the petition signed by a majority of the employees in the bargaining unit it is appropriate to defer the onset of negotiations until your local is shown to still represent the men after the election. We therefore decline your invitation to bargain at this time. [G.C. Exh. 5.][29]

Consistent with the foregoing, Rick Baumgarten informed the union representatives that he ''felt the election proceedings should be completed before we began . . . bargaining.''

On April 30, the Union, over Kasmer's signature, wrote Rick Baumgarten again requesting negotiating dates, while specifying four areas for discussion; namely, improved medical insurance, upgrading certain classifications or jobs, establishing a training program, and increased wages. There was no indication that the Union sought to raise the pension-profit sharing issue. Concerning the events of April 11, Kasmer stated:

> I realize that on April 11th when representatives from Local 1027 arrived at your Northside facility, you informed them that you felt it was appropriate to defer negotiations pending the outcome of a representation petition that was filed. I, however disagree and feel that it would be beneficial to all involved to negotiate in good faith now. [G.C. Exh. 8.]

On May 3, the Union filed additional refusal-to-bargain charges. (G.C. Exh. 1(c).)

On May 8, the Respondent replied by mail, advising the Union of its willingness to meet on May 23, with Rick Baumgarten explaining:

> While my personal feeling was that negotiations were inappropriate while an election petition was pending, I recognize that the law requires us to bargain in good faith upon your request.

The parties did in fact meet on May 23.

The Employer's reconsideration, and expressed will to resume renewal negotiations was consistent with statutory obligation. However, whether or not based upon a mistaken interpretation of law, its earlier conduct resulted in an irreparable loss of time. The Respondent, having set the chain in motion, alone bears responsibility for the failure to meet between April 11 and May 23.

The refusal to negotiate on April 11, was in clear breach of the duty under Section 8(d) ''to meet at reasonable times and confer in good faith.'' The pending representation petition was the sole ground upon which the Respondent declared a halt, of indefinite duration, to renewal negotiations. It claims that it had not seen, and had no idea what percentage of the bargaining unit manifested support for such an election. In *Dresser Industries*, 264 NLRB 1088 (1982), the Board held that ''the filing of a decertification petition, standing alone, does not provide a reasonable ground for an employer to doubt the majority status of a union.'' See also *Champ Corp.*, 291 NLRB 803 (1988); *Allied Industrial Workers v. NLRB*, 476 F.2d 868, 881–882 (D.C. Cir. 1973). It follows, that a withdrawal of recognition or a suspension of the employer's ongoing obligation to bargain in good faith is not privileged on that ground. See, e.g., *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982).

The Respondent does not argue that the Union actually lacked majority status on April 11,[30] and the record does not disclose that this was the case. The employee signatures, the bulk of which were not authenticated, offered in support of the petition merely expressed a desire for an election, and therefore did not constitute repudiation of the Union or evidence of loss of majority. See, e.g., *NLRB v. Gissel Packing*

[28] Just when the parties gave birth to this protocol is the subject of conflicting testimony. Kasmer testified that it took place on March 3, in context of a grievance meeting held at the Respondent's premises. However, his letter of March 26, indicates that this arrangement was made on February 19, a date consistent with Rick Baumgarten's testimony that it occurred in mid-February. Kasmer avers that his letter was in error, and that the correct date of the meeting was March 6. As the issue is collateral, it is assumed that the Respondent accurately portrays the timing of this agreement.

[29] The Respondent's representatives deny that they had seen the document signed by employees before taking this step. It is with interest that I note that in G.C. Exh. 5, Rick Baumgarten asserted as fact that the ''petition [had been] signed by a majority of the employees in the bargaining unit.'' In any event, Joe LaRosa testified that after he signed the petition, either Rick or Randy Baumgarten conducted a meeting stating that the Company had enough names. Rick and Randy both denied making any such remark. The incident was not mentioned in LaRosa's successive prehearing affidavits given on April 11 and May 19. I do not rely upon LaRosa's vague, uncorroborated testimony in this respect. LaRosa also confirmed that, earlier, when Jorge Alvarado, in his presence reported to Randy Baumgarten that he had ''all the names,'' the latter told Alvarado that he did not want to hear about it.

[30] See, e.g., *AMBAC International*, 299 NLRB 505 (1990); *Hearst Corp.*, 281 NLRB 764 (1986).

Co., 395 U.S. 575, 584 (1969); *Cumberland Shoe Corp*., 144 NLRB 1268 (1963).

The Respondent does contend that the Union acquiesced ''in the Company's initial suggestion'' that bargaining be delayed ''until your local is shown to still represent the men after the election.'' (G.C. Exh. 5.) This notion springs from the fact that the Union ''did nothing from April 11 through April 30'' to restore bargaining. In this fashion, the Respondent would foist upon the victim the onus for its own wrongdoing. The refusal to meet until reestablishment of majority through an election was communicated to the Union in absolute and otherwise unqualified terms. Having done so, the Respondent alone shouldered responsibility for removal of its self-imposed barrier to continued negotiation. It was not the Union's role to counsel the Respondent. In short, the former's reliance upon statutory remedies was in no way conditioned upon any requirement that it attempt to persuade the Employer as to the error in its ways. Equally nonmeritorious is the Respondent's argument that its May 8 letter ''cured'' any ''technical violation'' that might have emerged. On the contrary the Employer's refusal to meet created a serious breach in the negotiations, deferring the onset of negotiations to May 23, a hiatus whose impact was aggravated by Rick Baumgarten's admission that the parties had reached agreement ''on virtually all outstanding issues by the end of June.''

Accordingly, and, even were there no evidence that the Respondent, in other particulars, unlawfully inspired or contributed to the decertification activity, the Respondent's action in foreclosing negotiations between April 11 and May 23 was not legitimately grounded and constituted a refusal to bargain violative of Section 8(a)(5) and (1) of the Act.

b. *Alleged refusals to provide information*

(1) Preliminary statement

Perhaps the hardest fought issue in this proceeding derived from 8(a)(5) allegations pertaining to the Respondent's failure to provide requested and relevant information.

The Union's requests pertained to two areas, health insurance and profit sharing. The Chicago and Northeast Illinois District Council of Carpenters, with which the Union is affiliated, maintains its own health and welfare and pension plan. In the 1988–1989 negotiations, the Union sought coverage under both plans. However, it did not succeed, and, pursuant to the recently expired collective-bargaining agreement, employees continued to participate in the Employer's health and retirement programs. The Employer does not specifically challenge relevance, but argues that it made returns as per each request and ''the Union led the company to believe that its responses were sufficient, and that it was not necessary for the Company to provide any further information on insurance or profit sharing thereafter.''

(2) Health insurance

The complaint in Case 13–CA–29377 alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide a copy of the current health and life insurance policies, including complete cost information.

Health insurance was mentioned specifically by the Union, first, in its letter of April 30, and again at the May 23 bargaining session as an appropriate subject for ''upgrading'' during renewal negotiations. (G.C. Exh. 8.) As for the information request, the Union's letter of March 26, which later was renewed by letter dated May 22 stated:

> We would . . . request a copy of the current insurance policy, both health and life including complete cost information. We would also request any other information that you wish to provide at this time that may reflect on the contract renewal. [G.C. Exh. 10.]

It is undisputed that the Employer never provided the actual policy issued by the carrier. It is also undisputed that cost data was provided by the Respondent, but, according, to the General Counsel, the return was incomplete, hence, offering further substantiation to the 8(a)(5) allegation.

The 1988 negotiations and the ensuing contract provide understanding of the Union's interest in that information. Thus, those negotiations produced in article IX, section 1, the following accommodation:

> At such time when and if the Employers [sic] hourly rate of health insurance premiums, equals or exceeds the hourly rates of the Chicago and Northeast Illinois District Council of Carpenters Health Insurance Fund, said employer will affiliate with the Chicago and Northeast Illinois District Council of Carpenters Health Insurance Fund.

The Respondent suggests that, based upon the Union's posture, it in good faith was led to believe that the comprehensive summary of the plan, in the form a the carrier's health insurance booklet (R. Exh. 1), satisfied this request. Thus, Rick Baumgarten testified that it was his belief that the plan summary was in fact the insurance policy, and further that he was unaware of any other document possessed by the Company that might fit that description. At that point, in his mind, a distinction between the informational guide and the policy did not exist.[31] Baumgarten insists that he was first disabused of this misunderstanding while preparing for the trial, well after the withdrawal of recognition.[32]

Credibility is determinative here. Kasmer acknowledged that the booklet was furnished and was a basis for discussion at the June 7 negotiating meeting. However, in contrast with Baumgarten, he insists that the Company was at that time and on several other occasions informed that ''we needed the policy itself because the costs did not justify the coverage.''[33] The policy was not provided at the June 25 meet-

[31] I am not insensitive to the possibility of confusion as between this documents. This was evident from Kasmer's own testimony, where, he, at one point, used the term ''policy'' when referring to the plan summary.

[32] Baumgarten's testimony in this respect was weakened when on examination by counsel for the Charging Party, he confessed to limited recollection and stated that it was ''possible'' that Kasmer at the June 7 meeting asked for the policy itself.

[33] As I understood Kasmer's testimony, when the plan was referred to the Union's insurance specialists, they suspected the possibility that the Respondent had contracted for a higher premium but were actually paying less to subvert the contractual provisions requiring a shift to the union plan. The Union insists that this information was not available in the ''statement of the plan [R. Exh. 1],'' and that, without the policy the Union could not assess the true cost/coverage ratio, and hence determine whether, under art. IX, sec. 1, the carrier should be replaced by the Chicago and Northeast Illi-

ing, and, according to Kasmer, the Union again stated that it was necessary. He avers that the Respondent indicated that the policy would be forthcoming.[34]

As to the essentials, Kasmer's testimony seemed the more probable. I believe that the Union was concerned about the cost relationship between the Union's plan and that sponsored by the Company, and that the policy, not the plan summary, would be the document most likely to detail the premiums.[35] Both documents were necessary to evaluate the benefit/cost ratio, and to allay the possibility that actual expenses were hidden so as to perpetuate the existing plan. Based upon his credited account,[36] it is concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union a copy of its policy with Home Life Insurance Company.

Concerning cost information, Kasmer conceded that on June 7 cost data was produced by the Employer. (R. Exh. 2(b).)[37] The sufficiency of that tender is brought into question by vague references on the record to the Respondent's use of self-insurance in certain unspecified areas apparently where their was no coverage under the existing plan. As indicated above, the Union, after consultation with its internal insurance representative, argued at the bargaining table that the coverage provided was too great for the limited cost. To this, Rick Baumgarten advised that this was not the total cost and the Respondent on a self-insured basis was underwriting a part of the cost.[38] Rick Baumgarten agreed that a portion of the medical benefits not covered by the insurance carrier's program was provided by the Respondent on a self-insured basis. He states that he did not understand the finances concerning this arrangement, even when received ''long afterwards.'' There is no indication that this ''information'' existed in the form of data. It may not have, for, the uncovered risk could have been financed on a pay-as-you-go basis, without prior claim experience. In this respect, Rick Baumgarten declared that it was possible that the supplemental self-insurance program was unfunded. In any event, he denied any understanding of just how this risk was financed, and believably testified that his inquiries concerning the cost of this feature failed to turn up any information.

While Baumgarten's explanation seemed entirely credible, on the face of his testimony, the possibility remains that undisclosed health costs were sustained by the Respondent under the contractual health plan. In other words, the return made by the Respondent might well have been incomplete. By virtue of the expired collective-bargaining agreement, the cost factor determined whether the Union plan would replace the existing plan. The Union's request for cost data was entirely relevant, and as an element thereof, self-insurance costs, whatever the form, were an incremental element of the Union's request. A return was required under the Act, unless the Respondent could demonstrate that the information did not exist, or that it was physically unattainable. The Respondent's proof fails to tie down the issue, and leaves the matter in an enigmatic state. Having failed to meet its burden, the Respondent violated Section 8(a)(5) and (1) by failing to provide cost data defining the financial burden assumed in consequence of its own coverage of certain health risks.

(3) The profit-sharing data

The instant 8(a)(5) allegation pertains to the Respondent's alleged failure, upon request of the Union, to supply ''a list of Unit employees participating in Respondent's profit sharing plan, together with the rate of interest earned by the employee-participants.'' This allegation conforms with a written request made by the Union through letter of May 22. (G.C. Exh. 10.)

In their respect briefs, neither the General Counsel nor the Charging Party fault the Respondent's return under these particulars. Indeed, Rick Baumgarten testified credibly and basically without contradiction that at the May 23 session, the Union indicated that they ''had reason to believe that we had more than one profit-sharing plan or that there were different rates for different people in different positions in the company.'' Baumgarten disabused the Union of this notion, stating that the only plan in effect was that previously given to the Union. He identified the trustee that possessed the funds and explained that the interest was distributed on a pro rata basis. He described the formula used in calculating each par-

nois District Council of Carpenters Health Insurance Fund. Kasmer also testified that he wanted documentation from which the Union could verify the credibility of the carrier. He could not explain how the policy would throw light on this matter, nor did he identify other documentation sought in this connection. Indeed, the probabilities suggest that the Respondent was not possessed of any such information. In any event, the matter was neither alleged, nor fully litigated.

[34] The testimony of Bill McDaniel, a union business representative, was offered to corroborate Kasmer. He acknowledges that the informational booklet was turned over to the union's insurance representative, who advised the union negotiators that the actual policy was necessary to make an accurate cost assessment. McDaniel, however, did not state unambiguously that, a specific request for the policy was addressed to the Respondent during any bargaining session after June 7.

[35] In so finding, I reject the General Counsel's assertion that a transcript of sectors of the May 23 meeting (R. Exh. 8(b)) substantiates that the Employer was informed at that time that ''cost information'' would be referred to the Union's insurance experts for evaluation. I also reject the Respondents' assertion that the transcript confirms either the Union's disinterest or satisfaction with all information provided. In viewing that document as inconclusive in this latter respect, I have not overlooked that the meeting in question occurred after the Union on May 3 filed unfair labor practice charges based upon a failure to furnish information. (G.C. Exh. 1(c).) However, as the material requested was relevant, the Employer was obligated either to return the data or secure a clear, unmistakable, carefully tailored statement from the Union that it abandoned its claims for the information. Something less, including a good-faith interpretation of the Union's stance, would not excuse a failure to effect a full and complete return.

[36] The witnesses to what transpired at the negotiating session were not regarded as particularly reliable, and I have not credited either side down the line. Although the ultimate resolutions turn on several factors, the shift parallels burden of proof, as neither Rick Baumgarten, for the Respondent, nor Kasmer and McDaniel for the General Counsel were considered as effective vehicles for that purpose, thus, causing a determinative proof failure.

[37] The Respondent did furnish paid bills reflecting premiums paid for health and dental insurance. Although the precise submission made during the negotiations could not be replicated by available data, that which was submitted in evidence as R. Exhs. 2(a) and (b) and 4 are ''representative and typical of what the union was given.''

[38] This argument apparently was unresponsive to the Union's position which apparently was predicated upon coverage defined in the summary plan.

ticipant's entitlement. Kasmer testified that the Union was advised that the administrator of the trust had changed, and that the new trustee was in the process of revising the documentation concerning the plan, but that it would be delivered when available. There is no evidence that this revision had been completed at any time prior to, or contemporaneous with these negotiations.[39] The tape of that meeting indicates that at the close of the session, the Union expressed satisfaction, while declaring no need for further information in this respect.[40]

Although the proponents of the complaint offer not a clue that this was the case, the record appears to establish that the May 22 demand for a list of participants, facially, was not fulfilled by the Company's June 15 submission of a list of current employees, with dates of hire and rates of pay. (R. Exh. 9.) Baumgarten testified that apparently in 1989 unit employees voted to accept the Company's profit-sharing plan over the Union's retirement plant. Therefore, the assumption is that all unit employees, who had met basic eligibility criteria, were in this category except those hired since May 17, 1989. In other words, those employed on the effective date of the contract, were grandfathered, by choice, under the Respondent's preexisting profit-sharing plan. On the other hand, new employees were to be covered by the District Council's pension program. The list furnished by the Respondent included only one employee, Juan L. Santana, who was subsequently hired, and therefore should have been carried under the Union's pension program. The listing actually provided did not indicate that this was the case. The Union, unambiguously requested and had a right to specific information which would acknowledge whether the Respondent was following the contractual formula. The failure to provide the listing violated Section 8(a)(5) of the Act.

Apart from the above, it appears that, to the proponents of the complaints, on profit sharing, an unalleged issue has now become the cornerstone of the case against Respondent. Thus, according to Kasmer, the Union, at the June 7 negotiating meeting, also inquired as to whether different employees were receiving different interest rates, *and requested a statement as to the amounts held in each individual account*. The latter never was made the subject of a written request. The failure to provide this information is not mentioned in either complaint, nor was it the subject of any attempt to amend. Kasmer relates that the data was necessary in light of allegations by employees that different people were treated differently under the plan. The need for the information, as he relates was reiterated at the negotiating session on June 25.

Baumgarten denied that the Union ever specifically requested the individual accounts. He testified that the Union at the May 23 meeting expressed awareness that employees annually receive handwritten reports on their profit sharing. He acknowledged that this was the case, except that, under the present practice, they now receive a computer printout, revealing the value of the plan, the company contribution, the earnings for the prior year from investments and forfeitures, and the individual employee's share. The Union, according to Baumgarten, seemed quite satisfied with that explanation, and according to his recollection, at the conclusion of the May 23 meeting he asked if the Union wished any additional information, only to receive a negative response.

The tape of the session, though not totally complete, tends strongly to corroborate Baumgarten. It includes extensive discussion of employee accounts, but does not disclose a clear request on behalf of the Union that they be provided.

In this instance, Baumgarten is given benefit of the doubt. The accounts themselves were pivotal to any claim of discrimination as between participants. A request for this data, if intended, easily could have been phrased in unmistakable language, and I am puzzled by its omission from the Union's written information requests. Moreover, considering the state of the pleadings, and the tenor of the dialogue reflected by the tape of the May 23 meeting, as well as testimony by Union representative Bill McDaniel that such a request was made at the May 23 meeting, in this instance, the balance of probability tilted against Kasmer. I reject the testimony of Kasmer and McDaniel in this respect and find no credible basis for concluding that the Union ever requested the individual accounts. Accordingly, the Respondent did not violate Section 8(a)(5) and (1) of the Act in that respect.

c. *Termination of the relationship*

(1) Decertification activity: the second wave

After bargaining resumed on May 23, negotiation continued until June 23. During this period, in July, another petition was circulated for signature of employees who wished to rescind union representation. The evidence does not specify any supervening development that might have prompted this resurgent employee attempt to eliminate the Union. The document was inscribed as follows:

> With this document and signatures we, the Millshop employees of Lee Lumber and Building Material Corporation Located at 633 West Pershing Road, Chicago, Illinois, declare that as of July 3rd, 1990 will not continue to be represented by any union, institution or coalition.
>
> By our own conviction and without durest [sic] of any kind by anyone, we hereby decertify Carpenters Union Local number 1027, who's [sic] representative is: James Kasmar [sic]. [G.C. Exh. 17.]

Alvarado, the signatory to the decertification election petition, which he filed earlier in March, testified that he drafted the above document, virtually without assistance, knowing what to include because, as he put it: ''I worked on the Supreme Court of Costa Rica.'' Some 12 signatures, including that of General Foreman Victor Barba were solicited and appended to that document between July 2 and July 9.

Alvarado testified that, in contrast with the March petition, he knew that it was not necessary to take this document to the Board because earlier he had asked Ricky Baumgarten how to decertify the union and, in an open meeting with ''everybody,'' the latter replied: ''just sign the paper if you guys—or do whatever you want to do, but just sign the pa-

[39] Business Representative McDaniel admitted that the profit-sharing plan, in its only available form, had been delivered to the Union, as well as a verbal, detailed description of the formula or calculations made in reckoning each employee's entitlement.

[40] As indicated, the Union's statement that this was the case, has been construed as focusing exclusively upon the explanations actually provided by Baumgarten, with no intention to waive other documentation that had not been provided.

pers and give it to me, and I take care of the rest.'' Alvarado testified that he took the signed petition to Lee Baumgarten, the father of Rick and Randy, who upon learning that it concerned the Union, stated that he did not want to see it, referring Alvarado to Ricky. However, because Randy was available, Alvarado gave the petition to him.

(2) Victor Barba's involvement

The complaint in Case 13–CA–29619 alleges that the Respondent violated Section 8(a)(1) through Barba's having signed this petition. Barba, an admitted statutory supervisor, was not implicated in any other misconduct in connection with any sector of the decertification activity.[41] Santana, who had previously declined to sign, testified that he noticed Victor Barba's signature on that document, when asked to sign a second time. This time, he reversed himself, electing to sign. Santana did not relate that he was influenced to sign because of his observation of Barba's signature.

In terms of authorities, the General Counsel and the Charging Party leave me to my own devices on this issue. They cite not a single case supportive of the notion that a supervisor's signature on a document repudiating a union constitutes a per se violation of the Act. The Respondent, on the other hand, apparently was more diligent, having located a case which is directly on point.

It is true that, under the precedent, Barba's signature could not be counted toward the loss of majority. *Superior Bakery*, 297 NLRB 182 (1989). However, as observed by the Respondent, the Board has held that the signing, by one or more supervisors, of a document repudiating a union does not violate the Act, even if this occurred before a majority had appended their signatures. Thus, in *Indiana Cabinet*, 275 NLRB 1209, 1219 (1985), the Board approved dismissal of a similarly grounded 8(a)(1) allegation where Judge Bernard Ries concluded:

> [T]he mere signing of such a petition even by a full-fledged statutory supervisor is not likely to have a sufficiently coercive effect on the employees who are subsequently asked to sign so as to invalidate the petition itself as a basis for the withdrawal of recognition.

The 8(a)(1) allegation in this respect is dismissed.

(3) The withdrawal of recognition

A negotiating session was scheduled for July 3. The night before, Rick Baumgarten telephoned Kasmer indicating that there would be no meeting the next day because Randy Baumgarten had just reported that ''we have physical evidence that the employees didn't want the union.'' The Union also was advised, in writing, as follows:

> Lee Lumber has just received physical evidence that your union is no longer the representative of the Lee Lumber millshop workers. As such it would not be appropriate or proper for us to meet tomorrow for the purpose of collective bargaining. [G.C. Exh. 13.]

This did not deter the union representatives. On July 7 they reported in the interest of resumed bargaining. However, Rick Baumgarten again informed them that the Company had received evidence that the Union no longer represented a majority, and hence it would no longer meet. The Union insisted on continued negotiation, but the Respondent declined.

The Respondent's position was clarified by letter dated July 12, as follows:

> Following up our letter of July 2nd, this confirms that due to the decertification petition signed by a majority of the bargaining unit received by us, that effective with our correspondence July 2nd, we withdraw recognition of your union as representative. [G.C. Exh. 14.]

According to Randy Baumgarten, these measures stemmed from the fact that in early July, Alvarado came to his office area, suggesting that they retire to a more private locale. They did and Alvarado stated that he had another petition signed by a majority of the men. Before looking at the document, Baumgarten called Rick, telling him what had transpired.[42] Rick told him to take the document and report what it said. Randy read it to Rick over the phone. After reporting that it contained nine signatures, Randy was told to keep the document.[43]

Rick Baumgarten testified that he learned of the petition, by telephone, from his brother, Randy, who indicated that Jorge Alvarado possessed a document that he wanted to give him which pertained to the Union. Randy inquired as to what he should do, whereupon Rick advised him to examine it and relay its content. He specifically asked how many employees had signed. Rick Baumgarten then telephoned his attorney. After doing so, he informed the Union that he possessed physical evidence that it no longer represented the workers

[41] Barba, apparently because he had, in the past, performed production work, was included to the contract unit by agreement of the parties. He is exempted from union security, and his name does not appear on the contractual wage listing, but is on the seniority list. (G.C. Exh. 2.)

[42] Obviously, Randy Baumgarten did not, peremptorily, reject Alvarado upon learning that the proffered document was related to the Union. This time he took a deliberative approach, calling his brother for advice. This contrasted with his posture in March, when he waived his arms across his body as a gesture underscoring his interest in avoiding any knowledge of antiunion activity. Baumgarten when asked to explain this difference drew a distinction between employees stating that he wanted to *show* management a document, as they merely did in March, and employees stating they wished to give management a document, as was the case in July. Moreover, his entire response suggested that he was not addressing his immediate reaction, but rather was explaining why he read the latter document, but not that tendered in July, a difference he attributed to his brother's direction. My suspicion was no less than in the case of Alvarado's claim that his experience with the Supreme Court of Costa Rico enabled him to alone draft the second petition. There is every reason to believe that Randy Baumgarten was not taken by surprise at the document, since, as Alvarado had testified, his brother, Rick, had previously advised Alvarado to submit it to management.

[43] On cross-examination, Randy Baumgarten could not recall whether at the time he noticed that it included the signature of Victor Barba.

in the shop. He denied actually seeing the document until about weeks later.[44]

(4) Analysis

The General Counsel does not dispute that the decertification petition was signed by a majority and as such constituted objective evidence of loss of majority. Instead, the legitimacy of the Respondent's termination of the bargaining relationship is contested under a wide body of precedent precluding such action in the context of prior unfair labor practices ''of such a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself.'' *Guerdon Industries*, 218 NLRB 658, 661 (1975); *Helnick Corp*., 301 NLRB 128 (1991). Yet, it is also true that ''an employer may avoid a bargaining order by showing that the unfair labor practices did not significantly contribute to such a loss of majority or to the factors upon which a doubt of such majority is based.'' *NLRB v. Nu-Southern Dying*, 444 F.2d 11, 15–16 (4th Cir. 1971).

Here, the bargaining relationship was terminated against a background of unremedied illegalities which offer the most likely cause of the Union's loss of majority. First and foremost is the convincing evidence that the Respondent proceeded with that end in mind when it interfered with the internal relationship between the Union and represented employees by first fanning the flames of dissension, then providing information and pecuniary support to those who would further the cause of decertification. Once its intended result had been realized, the Respondent unlawfully caused a 6-week delay in contract negotiations, a step which in light of the status of negotiations as of July 3, reenforced the debilitating effects of the earlier misconduct. Thus, considering the Employer's own testimony, that the parties ''had reached almost complete agreement by the time the employees directly informed the Company of their clear desire to be free of the Union,'' it is entirely possible that this hiatus not only contributed to renewed frustration with collective bargaining, but prevented the Union from neutralizing doubts and restoring confidence among represented employees by offering the tangible assurances evident from a new contract. Accordingly, the Respondent failed to meet its burden of disassociating its unlawful conduct from the employee defections in July, and, hence, is not free to rely upon that factor as a means of evading its duty to bargain in good faith.[45] The Respondent violated Section 8(a)(5) and (1) of the Act by on July 3 withdrawing recognition from the Union.

d. *Derivative violations*

Consistent with the withdrawal of recognition, the Respondent subsequently discontinued payments to the Chicago and Northeast Illinois District Council of Carpenters Apprentice and Training Program,[46] declined to honor check-off arrangements, and cancelled visitation rights to union representatives. In addition, wage increases were granted to employees in the bargaining unit. There is no dispute that these steps were taken without notice to or bargaining with the Union. As the Respondent was, at the time, under a continuing obligation to bargain in good faith as to these matters, its unilateral action in each of the above particulars violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by encouraging and assisting employees in the filing of a decertification petition by initiating such conduct through remarks disparaging the Union's representational stance, and, in that context, providing information as to how and when to file a election petition, together with reimbursement for wages and parking fees that would otherwise be lost by employees who acted on that advice.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing to meet with the Union because a decertification petition had been filed, by refusing to provide requested information concerning the existing profit-sharing and health insurance plans, and by withdrawing recognition from the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full-time, part-time, temporary, or seasonal production and maintenance foremen, leadmen, journeymen, millmen, apprentices and all other employees engaged in work covered by the ''Occupational Jurisdiction of the Union (Mill-Cabinet-Industrial Division),'' including, but not limited to in-plant millwork production; fabrication of cabinets, tables, desks, doors, display fixtures, plastic laminates and veneers of all types used in the manufacture thereof; component parts; installers of hardware; gluers, scrapers of glue, sprayers; handlers of materials to and from clamp; benchwork assemblers, lay-out, operators of power machinery and hand power tools relating thereto.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, without notice to or negotiating with the Union, discontinuing checkoff and remittal of dues to the Union, discontinuing payments to the Chicago and Northeast Illinois District Counsel of Carpenters Apprentice and Training Program, discontinuing union visitation, and granting wage increases to unit employees.

[44] The day after initially presenting the document to Randy Baumgarten, Alvarado requested its return because others were interested in signing. Randy obliged.

[45] On the other hand the unlawful refusals to furnish information were technical violations which had no causative influence upon loss of majority. Noncompliances were marginal. The General Counsel's own description of the relevance of the health policy and the list of profit-sharing participants establishes that their utility was confined to the Union's interest in examining the Respondent's adherence to the old contract, as distinguished from any particularized demand in the renewal negotiations. The unavailability of such information was a behind-the-scenes affair which, if known by employees, was a minor matter of negligible concern. Reasonably viewed, these unfair labor practices, neither contributed to a delay in reaching an ultimate accord, nor otherwise contributed to employee discontent. *Deblin Mfg. Corp*., 208 NLRB 392, 401 (1974).

[46] *C. F. Eckert, Inc*., 301 NLRB 868 (1991).

6. The above unfair labor practices had an affect upon commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It shall be ordered that the Respondent recognize and bargain with the Union in good faith as exclusive representative of employees in the appropriate collective-bargaining unit. The Respondent having unilaterally declined to remit dues to the Union and having discontinued payments to the Chicago and Northeast Illinois District Council of Carpenters Apprentice and Training Program, shall be ordered to pay all such delinquencies from the date of its unlawful action, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It shall also be ordered that the Respondent continue such payments into the indefinite future, curtailing them only when and if its obligations in those particulars are expiated in accordance with lawful, statutory requirements. Finally, the Respondent shall be ordered to furnish the Union with a copy of its health insurance policy and with a list of all unit employees who participate in its profit-sharing plan.

[Recommended Order omitted from publication.]